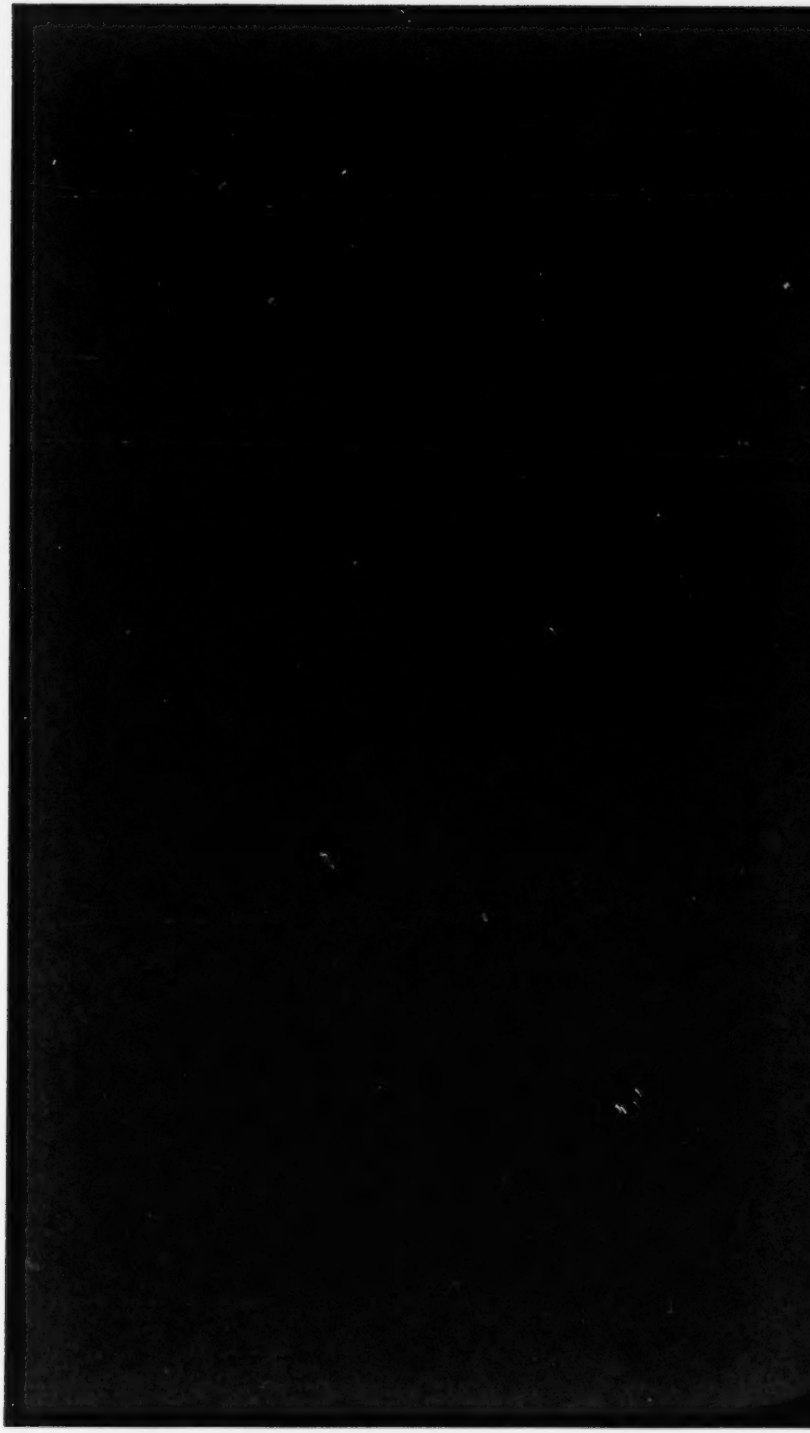

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457324—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1116

THE UNITED STATES OF AMERICA EX REL. JOHN C. McDERMOTT, PETITIONER

v.

ARTHUR G. JAEGER, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK, AND E. E. THOMPSON, WARDEN OF FEDERAL DETENTION HEADQUARTERS, NEW YORK CITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the circuit court of appeals (R. 25–28) is not yet reported. The district court opinion (R. 17–21) is reported at 39 F. Supp. 307.

JURISDICTION

The order of the circuit court of appeals dismissing the appeal was entered March 23, 1942 (R. 29). The petition for writ of certiorari was filed April 6, 1942. Although the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925 (Pet. 6) it seems clear that if jurisdiction is conferred upon this Court, it is not by that section but by Section 262 of the Judicial Code (28 U. S. C. 377). See 28 U. S. C. 463 (c); *In re 620 Church Street Corporation,* 299 U. S. 24, 26.[1]

QUESTIONS PRESENTED

1. Whether the circuit court of appeals had jurisdiction under 28 U. S. C. 463 (a) to entertain petitioner's appeal from the order of the district court discharging a writ of habeas corpus issued to test the validity of a removal proceeding, it being contended in the appellate court that the removal proceeding was unauthorized.

2. Whether the federal removal statute authorizes removal to the Canal Zone to answer an information filed in the United States District Court for the District of the Canal Zone in the name of the Government of that Zone, charging a violation of 18 U. S. C. 502, which interdicts tampering with a vessel entitled to engage in foreign commerce.

STATUTES INVOLVED

28 U. S. C. 463 (a) provides in part:

> In a proceeding in habeas corpus in a district court, * * * the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: *Provided, however,* That

[1] It is doubtful, however, whether Section 262 applies. See footnote 6 *infra*, p. 9.

there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings. * * *

18 U. S. C. 591 reads as follows:

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

STATEMENT

On May 20, 1941, petitioner filed in the United States District Court for the Eastern District of New York a petition for a writ of habeas corpus on behalf of four persons, Guiseppe Ferrara, Luigi Rosato, Salvatore Piccaluga and Eusibio Ceccarelli, alleging that they were arrested by the United States Marshal for the Eastern District of New York by virtue of a warrant issued by a United States Commissioner, based upon an information filed by the United States Attorney for the District of the Canal Zone and certain bench warrants, each bearing a *non est* return, issued by the United States District Court for the District of the Canal Zone; and that they were illegally imprisoned and restrained of their liberty by the respondents because the information referred to does not state a crime against the United States, there was no probable cause to believe they were guilty of the crime alleged in the information, and the District Court for the District of the Canal Zone was without jurisdiction "to find such information" and did not have jurisdiction over the crime charged therein (R. 3–5).

The court issued the writ, returnable May 22, 1941 (R. 2). On that date the respondent United States Marshal produced Ferrara, Rosato, Piccaluga and Ceccarelli before the court (R. 5) and submitted a copy of the "Minutes of Hearing in Removal Proceeding" before the Commissioner

(R. 6–11) and a copy of the information referred to in the petition (R. 12–13), which is designated in the record as "Exhibit Submitted by Government With Minutes on Hearing in Removal Proceeding" (R. 12). The information, filed April 8, 1941, in the United States District Court for the District of the Canal Zone, is entitled "The Government of the Canal Zone vs. Giuseppe Ferrara" et al. (R. 12, 14) and charged Ferrara, Rosato, Piccaluga, Ceccarelli, and five others with a violation of 18 U. S. C. 502—tampering with a vessel entitled to engage in foreign commerce—"contrary to the law in such case made and provided and against the peace and dignity of the Government of the Canal Zone" (R. 12–13). The minutes of the removal hearing held May 20, 1941 (R. 6), reveal that: (1) the Government elected "not to press these removal proceedings" against the five other defendants (R. 7); (2) the attorneys for Ferrara, et al., raised only one contention in the proceeding, namely, that the information did not state a violation of 18 U. S. C. 502 and therefore did not show probable cause for holding the defendants (R. 7, 8–10, 11); and (3) the United States Commissioner overruled the contention and held Ferrara, Rosato, Ceccarelli and Piccaluga for removal to the Canal Zone (R. 11).

The district court, on June 17, 1941, dismissed the writ of habeas corpus and remanded the four defendants to the custody of the marshal (R. 15–

16). An opinion was filed in which the court overruled petitioner's contentions that the defendants could not be removed to answer the information because the crime charged was an infamous one requiring an indictment under the Fifth Amendment (R. 19–21) and that the removal order was deficient because no evidence had been taken at the removal proceeding (R. 21).[2]

Petitioner's appeal was dismissed by the circuit court of appeals (R. 29) under 28 U. S. C. 463 (a), *supra,* pp. 2–3, which prohibits an appeal from an order "in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings" (R. 28).

ARGUMENT

Petitioner asserts (Pet. 6–8) that an appeal from an order discharging a writ of habeas corpus

[2] The court stated that another ground urged as to the invalidity of their detention—that the statute conferring jurisdiction upon the District Court of the Canal Zone did not give that court jurisdiction over offenses under 18 U. S. C. 502—was "no longer urged," as the Government's brief made it clear that the power was conferred by the Act of June 15, 1917, c. 30, 40 Stat. 231, and that the omission of reference to this offense in "the United States Code" was due to a printing error (R. 19). The court undoubtedly refers to the United States Code Annotated, since the code printed by the Government Printing Office (1934 ed.) specifically mentions Section 502 (18 U. S. C. 574).

is not prohibited by 28 U. S. C. 463 (a) (*supra*, pp. 2–3) unless the removal proceeding is authorized by 18 U. S. C. 591 (*supra*, p. 3). Upon this assumption he contends that the removal proceeding was not authorized by 18 U. S. C. 591 because: (1) the information did not charge an offense committed against the United States (Pet. 3, 8–9); (2) the removal was not from one district to another (Pet. 3, 9–11); (3) the Canal Zone Code provides for extradition, not removal (Pet. 11–14); and (4) the return of an indictment is, under the Fifth Amendment, a condition precedent to removal proceedings under 18 U. S. C. 591 (Pet. 4, 14–17).

1. It should be observed that, as was indicated by the circuit court of appeals (R. 26), there can be no doubt that the defendants were taken into custody under color of the authority granted by the removal statute, and that there was no suggestion by petitioner either in the hearings before the Commissioner or in the District Court that the "proceedings were not 'removal proceedings'" under 18 U. S. C. 591. To us it seems sufficient under the proviso in 28 U. S. C. 463 (a) to bar an appeal from an order dismissing a writ of habeas corpus to test the validity of a removal proceeding that the proceeding is instituted "pursuant" to 18 U. S. C. 591, even though it may not be actually "author-

ized"[3] by that section.[4] The avowed purpose of Congress in enacting the proviso was to "preclude any appeal from the order dismissing the writ of habeas corpus and remanding the prisoner for removal" (H. Rep. No. 1543, 75th Cong., 1st sess., p. 3). If the Government's construction of the proviso were not correct the door would be opened to numerous appeals, with that consequent delay in removal which the proviso was designed to prevent (H. Rep. No. 1543, *supra,* pp. 1, 2; see also S. Rep. No. 1943, 75th Cong., 3d sess.). Presumably Congress thought that the sifting process of habeas corpus would sufficiently protect against any grave injustice and that the desideratum of expeditious removal was the paramount consideration.[5] We

[3] Petitioner asserts that the words "pursuant to the provisions" contained in the proviso of the statute mean "authorized by the provisions," citing *Old Colony Trust Co.* v. *Comm'r*, 301 U. S. 379 (Pet. 8). But in that case the Court stated that "'Pursuant to' is defined as 'acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according'" (p. 383). Obviously, the use of any of these definitions in the statute in place of "pursuant to" would not impel the interpretation which petitioner assumes. As this Court stated in *Old Colony Trust Co.* v. *Comm'r, supra*, "The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary" (p. 383).

[4] The court below found it unnecessary to determine this question because it was of the view that the removal was authorized by 18 U. S. C. 591 (R. 26–27).

[5] The present case, in which the writ of habeas corpus was discharged by the District Court nearly a year ago, well illustrates the delay which would result if an appeal were permitted in any case.

therefore are of the view that the appeal did not lie despite the contentions of petitioner that 18 U. S. C. 591 did not sanction the removal proceeding.[6]

2. But even if we are wrong in our interpretation of the statute, the dismissal of the appeal was nevertheless proper and presents no question worthy of review by this Court. The circuit court of appeals has adequately answered petitioner's contentions on their merits (R. 27–28), showing that the crime charged by the information is a crime against the United States irrespective of the "procedural entitlement of the case" (R. 27), upon which petitioner relies (Pet. 8–9); that the removal of the offenders to the jurisdiction of the United States District Court for the District of the Canal Zone is a removal from one district to another and not a removal to "some foreign country" (Pet. 9–10); and that extradition is not required merely because the removal statute is not reprinted in the Canal Zone Code, as petitioner contends (Pet. 9–14).[7] As the court below held

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[6] Since the purpose of 28 U. S. C. 463 (a) was presumably to bar any appellate review, it is doubtful whether this Court would have jurisdiction under Section 262 to review the action of the circuit court of appeals in dismissing the appeal.

[7] Petitioner's argument that the removal proceedings were invalid because the offenders were held to answer an information and not an indictment, was disposed of by the trial court on the grounds (1) that the removal statute "makes no distinction between an indictment and an Information as the basis for arrest or removal," (2) the indictment requirement of the Fifth Amendment is inapplicable to the

(R. 27), "The case therefore falls squarely within the provisions of 18 U. S. C. § 591."

CONCLUSION

The appeal was properly dismissed by the circuit court of appeals. No conflict of decisions or important question of law is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1942.

Canal Zone, and (3) that, in any event, the question is one which is more properly determined by the court where the trial is to be had (R. 18–21).

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